

VIRGINIA:

FILED IN THE CLERK'S OFFICE
OF THE CIRCUIT COURT OF THE
ALBEMARLE CIRCUIT COURT

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

DATE: 11/04/2019 08:30:34

----- x
DEVIN G. NUNES,

Plaintiff,

v.

THE MCCLATCHY COMPANY, ELIZABETH A.
"LIZ" MAIR, and MAIR STRATEGIES, LLC,

Defendants.
----- x

TESTE: -----
CLERK/DEPUTY CLERK

Case No. CL19-629

**SPECIALLY-APPEARING DEFENDANT THE MCCLATCHY COMPANY'S
EMERGENCY MOTION TO CONTINUE NOVEMBER 4, 2019 HEARING**

Specially-Appearing Defendant The McClatchy Company ("McClatchy") respectfully moves the Court, pursuant to Rule 4:15(d), to adjourn the hearing scheduled for today and to reschedule the hearing for the earliest date that the Court and the parties are available.¹

1. The hearing on McClatchy's Motion to Dismiss and Motion for a Protective Order is scheduled for today at 1:00 pm ET.

2. Lead counsel for McClatchy, Theodore J. Boutrous, Jr., lives in Los Angeles, California. He has been admitted to appear *pro hac vice*, and had prepared and intended to appear in-person for the hearing to argue both motions.

3. Last week, Mr. Boutrous was under a mandatory evacuation order as a result of the Getty fire burning in Los Angeles County. The Getty fire started on October 28, 2019, and has

¹ McClatchy files this motion by limited special appearance. Because this motion seeks only to reschedule a hearing date, it is "unrelated to adjudicating the merits" and therefore "does not waive any objection to personal jurisdiction." Va. Code § 8.01-277.1(B).

burned more than 400 acres of land. See FEMA, *FEMA Fire Management Assistance Granted for Getty Fire* (Oct. 28, 2019), <https://tinyurl.com/y4r5tunv>.

4. When the mandatory evacuation order was lifted last Friday, November 1, Mr. Boutrous was able to confirm what news reports had indicated: the wildfire had destroyed or damaged numerous homes in his neighborhood; the house next door to his was burned to the ground. He also was able to visit his own home for the first time since the fire, and discovered that the fire had caused substantial damage to his home. His home is currently uninhabitable. It will take weeks, if not months, to repair the damage.

5. Within minutes of discovering the damage, Mr. Boutrous emailed Steven Biss, counsel for Plaintiff, and asked for consent to a request to postpone today's hearing. Mr. Boutrous sent the email at 3:45 pm ET on Friday. **Exhibit A.** Mr. Biss never responded.

6. Thirty minutes later, at 4:15 pm ET, another member of McClatchy's defense team went to Mr. Biss's office in Charlottesville. Counsel for McClatchy spoke to Mr. Biss in person, explained that a natural disaster had impacted the attorney for McClatchy scheduled to appear at today's hearing, and asked Mr. Biss to consent to a request for postponement. Mr. Biss responded that he was too busy to take a position on the request, but would get back to defense counsel after he finished with a filing due later that day in an unrelated case.

7. Ten minutes later, at approximately 4:25 pm ET, counsel for McClatchy called Mr. Biss, left a voicemail explaining the damage to Mr. Boutrous's home, and again asked Mr. Biss to consent to a request to postpone today's hearing. Ms. Biss never returned the call.

8. Immediately thereafter, at 4:30 pm ET, counsel for McClatchy emailed the Court Administrator, Denise Hodges, and copied Mr. Biss. In the email, counsel for McClatchy explained that the wildfire had damaged Mr. Boutrous's home, asked for an adjournment of

today's hearing, apologized for any inconvenience the adjournment may cause, and offered to reschedule the hearing at the earliest convenience of the Court and the parties. **Exhibit B.** Mr. Biss never responded to the email.

9. The next day, November 2, counsel for McClatchy again emailed Mr. Biss and again asked for a response to McClatchy's request for a postponement of today's hearing "in light of the damage caused to Ted Boutrous's home by the Getty fire in Los Angeles." **Exhibit C.**

10. At 7:00 pm ET last night, November 3, Mr. Biss responded to the November 2 email. Mr. Biss asserted that he is "suspicious about the request to continue," refused to consent to the request, and said "McClatchy needs to move the Court for a continuance." **Exhibit D.**

11. Mr. Boutrous and his wife spent the weekend staying at a hotel and going back and forth to their house while working to find contractors to begin repairs and clean up as soon as possible. Those efforts will need to continue well into this week. The soot, ash, and smoke damage can be aggravated if not cleaned up immediately.

12. McClatchy is willing to reschedule the hearing as soon as practicable. To that end, Mr. Boutrous could be available next Tuesday, November 12. The Court offered that date when the parties were originally trying to schedule a hearing on the Motion to Dismiss.

13. There is ample good cause for this Court to exercise its discretion under Rule 4:15(d) to continue today's hearing: a natural disaster damaged the home of McClatchy's lead counsel just one business day before today's hearing; the hearing involves two motions, one of which is dispositive; McClatchy is the movant for both motions; no witnesses are scheduled appear at the hearing; Mr. Biss's office is located less than one mile from the Court; counsel for McClatchy promptly notified Mr. Biss of these extraordinary circumstances via email, telephone, and in-person; counsel for McClatchy promptly notified the Court via email last Friday, and also

filed this motion one business day after Mr. Boutrous learned that the wildfire damaged his home; and McClatchy is prepared to argue the motions on Tuesday next week. *See Obrist v. Lantz*, 73 Va. Cir. 80 (2007) (“It is axiomatic that a motion for continuance is addressed to the sound discretion of the trial judge who must consider all the circumstances of the case.” (quotation marks omitted)).

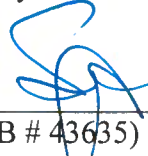

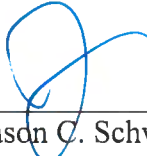
WHEREFORE, Specially-Appearing Defendant McClatchy respectfully requests that the Court adjourn today’s hearing and reschedule it for the earliest date that counsel and the Court are available, and to grant any other relief the Court deems necessary, just, and proper.

Dated: November 4, 2019

Respectfully submitted,

The McClatchy Company

By Counsel:



Jason C. Schwartz (VSB # 43635)
Brandon L. Boxler (VSB # 81884)
Katherine Maddox Davis (VSB # 89104)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
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Facsimile: (202) 530-9522
jschwartz@gibsondunn.com
bboxler@gibsondunn.com
kdavis@gibsondunn.com

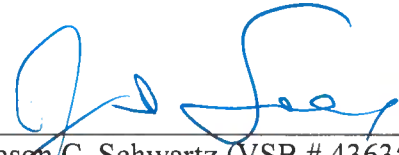
Theodore J. Boutrous Jr. (admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071-3197
Telephone: (213) 229-7804
Facsimile: (213) 229-6804
tboutrous@gibsondunn.com

*Attorneys for Specially-Appearing Defendant
The McClatchy Company*

CERTIFICATE OF SERVICE

I certify that on this 4th day of November, 2019, I caused a true and correct copy of the foregoing to be served by email, on the following:

Steven S. Biss, Esq.
stevenbiss@earthlink.net
Counsel for Plaintiff Devin G. Nunes



Jason C. Schwartz (VSB # 43635)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, D.C. 20036
Telephone: (202) 955-8242
Facsimile: (202) 530-9522
jschwartz@gibsondunn.com

Exhibit A

From: Boutrous Jr., Theodore J.
Sent: Friday, November 1, 2019 3:45 PM
To: Steven S. Biss
Cc: Davis, Katherine Maddox; Schwartz, Jason C.; Boxler, Brandon L.; Dore, Michael H.
Subject: Re: Nunes - McClatchy

Steven — our house has been damaged in the wildfires and we have been on mandatory evacuation until just now. I am going to ask the judge to postpone Monday's hearing to deal with this. Will you consent?

Theodore J. Boutrous Jr.

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On Oct 31, 2019, at 11:53 AM, Steven S. Biss <stevenbiss@earthlink.net> wrote:

[External Email]

All,

The Court Administrator (Denise Hodges) advised me that the hearing has been moved to 1:00PM on Monday.

She asked me to let everyone know.

Call or email me if you have any questions. Happy Halloween.

Steven S. Biss
(Virginia State Bar # 32972)
300 West Main Street, Suite 102
Charlottesville, Virginia 22903
Telephone (804) 501-8272
Facsimile: (202) 318-4098
Email: stevenbiss@earthlink.net
Email: stevensbiss@protonmail.ch
www.linkedin.com/in/steven-s-biss-6517037

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Exhibit B

From: Boxler, Brandon L.
Sent: Friday, November 1, 2019 4:31 PM
To: dhodges@albemarle.org
Cc: Steven S. Biss
Subject: Nunes v. McClatchy, CL19-629.

Ms. Hodges,

I am counsel for Defendant The McClatchy Company in *Nunes v. McClatchy*, CL19-629. I write to respectfully request that the Court adjourn Monday's hearing on McClatchy's motion to dismiss and motion for a protective order.

Lead counsel for McClatchy, Ted Boutrous, lives in Los Angeles and was planning to appear and argue the motions. Unfortunately, he has been on mandatory evacuation as a result of the wildfires, and just learned that his house has been damaged, and he needs to deal with the aftermath.

We apologize for the last-minute request and the inconvenience this request may cause the Court. We are willing to reschedule the hearing at the Court's earliest convenience after conferring with counsel for Plaintiff, Mr. Steve Biss. I have copied Mr. Biss on this email.

Sincerely,
Brandon

Brandon L. Boxler

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BBoxler@gibsondunn.com • www.gibsondunn.com

Exhibit C

From: Dore, Michael H.
Sent: Saturday, November 2, 2019 1:27 PM
To: Steven S. Biss
Subject: RE: Nunes - McClatchy

Steven,

Yesterday, we sent you an email, left you a voicemail, and made an in-person visit to your Charlottesville office to seek your agreement to postpone Monday's hearing in light of the damage caused to Ted Boutrous's home by the Getty fire in Los Angeles. To this point, however, I don't believe we've heard back from you.

I'm sure you are very busy. But I'm also confident you are familiar with and adhere to the Principles of Professionalism endorsed by the Supreme Court of Virginia, which state, for example, that lawyers should "[c]ooperate as much as possible on procedural and logistical matters," "[c]ooperate in scheduling ... hearings," return communications as promptly as they can, and "[a]gree whenever possible to opposing counsel's reasonable requests for extensions of time" consistent with the clients' interests. <https://www.vsb.org/pro-guidelines/index.php/principles/>.

We accommodated your schedule in setting Monday's hearing. A natural disaster has now severely impacted the lead lawyer (admitted *pro hac vice*) who was going to appear at that hearing. This should be pretty simple. We would appreciate the professional courtesy of a response and your consent to postpone Monday's hearing. Thanks.

Michael Dore

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MDore@gibsondunn.com • www.gibsondunn.com

From: Boutrous Jr., Theodore J. <TBoutrous@gibsondunn.com>
Sent: Friday, November 1, 2019 12:45 PM
To: Steven S. Biss <stevenbiss@earthlink.net>
Cc: Davis, Katherine Maddox <KDavis@gibsondunn.com>; Schwartz, Jason C. <JSchwartz@gibsondunn.com>; Boxler, Brandon L. <BBoxler@gibsondunn.com>; Dore, Michael H. <MDore@gibsondunn.com>
Subject: Re: Nunes - McClatchy

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Theodore J. Boutrous Jr.

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All,

The Court Administrator (Denise Hodges) advised me that the hearing has been moved to 1:00PM on Monday.

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Call or email me if you have any questions. Happy Halloween.

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Exhibit D

From: "Steven S. Biss" <stevenbiss@earthlink.net>
Date: November 3, 2019 at 7:00:56 PM EST
To: "Dore, Michael H." <MDore@gibsondunn.com>
Subject: Re: Nunes - McClatchy

[External Email]
Michael,

Thank you for your email.

I am very concerned and suspicious about the request to continue:

1. I am glad you invoked the Principles of Professionalism. When this case began, I asked Ted Boutrous for the simple courtesy of accepting service for McClatchy. He refused. That hurt. We generally don't do that in Virginia.
2. Mr. Boutrous did not sign any of McClatchy's motion papers. I am having difficulty understanding why he even needs to be at the hearing.
3. When I notified Mr. Boutrous that Judge Higgins requested we move the hearing to 1PM, Mr. Boutrous emailed me to say "Thanks". No mention of wildfires, evacuations. No emergency. Two hours later – Friday at 3:45PM – he advised for the first time that there was an issue. The 11th hour timing of his email is very strange. Concerning.
4. I spent all week preparing for the hearing. While I am sympathetic to the victims of the California wildfires, McClatchy has at least four (4) other attorneys who are counsel-of-record and well-qualified to handle the hearing.
5. Finally, and most significant to me, Mr. Boutrous is a witness. Unfortunately, he abandoned his role as attorney and chose to attack my client on Twitter. While I understand that he has strong ideological and political persuasions, that bias and prejudice probably disqualifies him from serving as counsel in this case. His tweet on April 8, 2019 is illustrative:



Ted Boutrous ✓
@BoutrousTed

The Speech or Debate Clause
Constitution will not protect
@DevinNunes from being hit
monetary sanctions for frivolous
fraud litigation, and the fact that
engaging in a pattern of it will
cause the courts to make the
sanctions more severe.

So, given all the circumstances, I think McClatchy needs to move the Court for a continuance.

Please include me on all emails and phone calls with the Court tomorrow.

From: Dore, Michael H.
Sent: Saturday, November 02, 2019 1:27 PM
To: Steven S. Biss

Subject: RE: Nunes - McClatchy

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Plaintiff,	:
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v.	:
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THE MCCLATCHY COMPANY, ELIZABETH A.	:
"LIZ" MAIR, and MAIR STRATEGIES, LLC,	:
	:
Defendants.	:
-----x	

Case No. CL19-629

[PROPOSED] ORDER

At the Circuit Court for the County of Albemarle this ____ day of _____, 2019,
having considered Specially-Appearing Defendant The McClatchy Company's Emergency
Motion to Continue November 4, 2019, Hearing;

IT IS HEREBY ORDERED that the Specially-Appearing Defendant's motion is
GRANTED. Endorsement of counsel is dispensed with for good cause shown.

The Honorable Cheryl V. Higgins,
Presiding Judge, Albemarle Circuit Court